No. 11905

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAN DIEGO GAS & ELECTRIC COMPANY, a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLEE'S BRIEF.

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Statement of Jurisdiction.

Appellant brought an action against the United States under authority of United States Code, Title 28, Section 931. That Section confers jurisdiction upon the District Court to try the case. United States Code, Title 28, Section 225 and Section 933 vests jurisdiction in this Court to determine the appeal.

Statement of the Case.

On February 18, 1947, Appellant filed a Complaint for Damages in the District Court. The Complaint was filed pursuant to the provisions of the "Federal Tort Claims Act." After alleging the corporate character of the plaintiff and the ownership by the plaintiff of certain trans-

mission lines for the transmission of electricity, the Complaint alleges:

> "That on or about the 5th day of September, 1945, Glen D. Ferrin was a non-commissioned officer in the United States Coast Guard, to wit, a Chief Aviation Pilot, and that he was on said date attached to the United States Coast Guard Air Station at San Diego, California, and that on said date and while he was acting in line of duty operating and flying a certain airplane belonging to the defendant herein, the said Glen D. Ferrin piloted and operated the said airplane in such a negligent, careless and reckless manner as to cause the same to crash and collide with said plaintiff's transmission line crossing said Mission Gorge, thereby injuring, breaking and damaging said transmission line and the said supporting structures at either end of the same, including the equipment and installations used in connection therewith." [R. 3.]

It was further alleged that plaintiff was required to expend the sum of $2,166.89 for necessary repairs to said transmission lines and its supporting structures. On October 2, 1947, Appellee filed its Answer, wherein it admitted the ownership of the airplane described in the Complaint and its operation by the pilot named in the Complaint, at the time therein specified. The negligent operation of the airplane was denied. The case was called for pre-trial hearing on December 8, 1947. At that time it was stipulated that in the event the plaintiff was entitled to recover, it would be entitled to damages as prayed in the Complaint.

It was further stipulated that Section 60.105 of the Civil Air Regulations of the Civil Aeronautics Board of the Department of Commerce enacted pursuant to the

authority contained in United States Code, Title 49, Section 551, was applicable to Coast Guard pilots and that they were bound thereby. Insofar as applicable to this case, said regulation provided:

> "* * * Except when necessary for taking off and landing, aircraft shall be flown:
>
> * * * * * * * *
>
> "(b) * * * at an altitude of not less than 500 feet, except over water or areas where flying at a lower altitude will not involve hazard to persons or property on the surface."

It was further stipulated that plaintiff's transmission line which was involved in the accident included wires the lowest of which was 187 feet above the creek bed. The middle wire was 198 feet above the creek bed and the highest wire was 210 feet above the creek bed.

It was stipulated that the wires were strung upon towers one of which was located upon land owned by the City of San Diego and the other upon land leased by private individuals to Appellant and that the wires were strung between the two towers over land which was in the public domain. It was stipulated further that a proper franchise existed with respect to the towers and power lines.

Photographs which are before this Court in their original form, by virtue of a stipulation and order appearing at page 17 of the Record, were received in evidence at the pre-trial hearing by stipulation. These photographs were admitted for use of the witnesses in illustrating their testimony, and it was stipulated that they do not in themselves depict the height of the wires [R. 23-26]. At the request of plaintiff, the pre-trial was followed by immediate trial.

The Facts.

The facts contended in Appellant's Statement of the Case are, in the opinion of Appellee, correctly stated with one exception and subject to one addition. Appellee, therefore, does not submit a complete Statement of Facts but does challenge the statement appearing on page 5, line 14, of Appellant's Brief to the effect that approximately a minute after the airplane involved in the accident entered Mission Gorge and passed from view of the witnesses, a motorist advised Appellant's witnesses that the accident had occurred. The testimony is not to that effect but rather witness, R. H. Tinkham, went to the scene of the accident not more than five minutes after the airplane went out of his sight [R. 45]. Appellant's Statement of the Case omits reference to the testimony of Appellant's witness, Kenneth R. Tinkham, to the effect that Gillespie Airport is an emergency landing located three miles from the point at which the accident occurred [R. 40].

The Rule Res Ipsa Loquitur Does Not Apply to the Facts of This Case.

The principal rule sought to be invoked by Appellant is the doctrine of *res ipsa loquitur;* the second theory is that the evidence directly established the negligent operation of Appellee's airplane. The doctrine of *res ipsa loquitur* has been held not to apply to falling airplane cases.

In *Towle v. Phillips,* 172 S. W. 2d 806, the Supreme Court of Tennessee, in commenting upon earlier cases from other jurisdictions in which litigants had sought to

escape the necessity of proving actual negligence by virtue of the *res ipsa loquitur* rule, said:

> " 'The decision of cases of that nature rests upon facts constituting a part of a wide spread fund of information.' Wilson v. Colonial Air Transport, Inc., 278 Mass. 420, 180 N. E. 212, 214, 83 A. L. R. 329.
>
> "Likewise in Rochester Gas & E. Corp. v. Dunlop, 148 Misc. 849, 266 N. Y. S. 469, the Court agreed that in the present state of aircraft development the doctrine of *res ipsa loquitur* could not be applied to the fall of an airplane when it was common knowledge that it fell from causes of which the pilot had no control.
>
> "The Court of Appeals expressed similar views in Boulineaux v. Knoxville, 20 Tenn. App. 404, 99 S. W. (2d) 557."

A like opinion has been expressed in 1935 by the Court of Appeals of Tennessee, Eastern Section, in

Boulineaux v. Knoxville, 99 S. W. 2d 557, at 560,

where the following language occurs:

> "In reply to the further issue, the court states that the trial court did not err in charging the jury that they must determine the act of negligence that proximately caused the injury. This is not a case for the application of the doctrine of *res ipsa loquitur,* for it is a common and not an unusual occurrence for airplanes to stall and fall while in operation, and without the intervention of negligence upon which they attributed the proximate cause of the injury. The court explained to the jury that it could not speculate or guess, but must determine the negligence cause. This is an elementary rule."

A proper case for the application of the doctrine of *res ipsa loquitur* in aviation is to be found in

Smith v. O'Donnell, 12 P. 2d 933; 215 Cal. 714.

In that case, application of the doctrine was made but such application was conditioned upon three factors:

(1) There was a collision between two planes;

(2) There was injury to the person; and

(3) There was the relationship of passenger and common carrier between the parties.

The Court in that case took pains to emphasize the reason for the application of the doctrine, devoting considerable space to demonstrating that the plaintiff was a passenger and that a common carrier is held to the highest degree of care. The California Court was, therefore, merely following the rule that has been long established that a *prima facie* case is made against the carrier when it is shown that a collision occurred in which a passenger was injured. Many cases have held that a presumptive negligence arises where a passenger on the car of a common carrier receives injury from the operation of the car. The rule in such cases rests upon the high degree of care required of a carrier toward its passengers and the defendant's greater ability to show the causes of the accident.

The within action is manifestly and clearly distinguishable from those cases which sought to apply the doctrine of *res ipsa loquitur*. The within case is one involving damage to property and not to the person. The United States is not a common carrier. The United States does not owe the highest degree of care with respect to wires maintained across the public domain by utility companies.

Further helpful analysis of the doctrine of *res ipsa loquitur* is found in

Waller v. Southern Pacific Co., 37 Fed. Supp. 475 (Dist. Ct. N. D. Calif.).

In that case the Court cited the following excerpt from

Sweeney v. Erving, 228 U. S. 233:

> "In our opinion, *res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it; that they make a case to be decided by the jury, not that they forestall the verdict. *Res ipsa loquitur,* where it applies, does not convert the defendant's general issue into an affirmative defense. When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."

See also,

Smith v. Whitley, 27 S. E. 2d 442,

wherein it was said:

> "The doctrine of *res ipsa loquitur* does not apply because any number of causes may have been responsible for the plane falling, including causes over which the pilot has absolutely no control, it being common knowledge that aeroplanes do fall without fault of the pilot."

Appellant relies heavily upon

Smith v. O'Donnell, 215 Cal. 714.

It is true that the Court in that case applied the doctrine of *res ipsa loquitur* to an action involving a collision between two aircraft. The application of that decision to the facts of this case is inappropriate in that the California Supreme Court devoted most of its opinion to a determination that the operator of the airplane in that case was a common carrier. *Res ipsa loquitur* was applied because of the high degree of care required of a common carrier to those trusting themselves to it as paying passengers. Appellant in this case did not enjoy the same relationship to the United States that the passenger in the airplane enjoyed in the case of *Smith v. O'Donnell.*

Negligent Operation of Appellee's Airplane Was Not Established.

Appellant argues that the mere act of operating an airplane at an altitude of 200 feet in the face of an appropriate Department of Commerce regulation requiring operation at 500 feet is negligence. It is argued that the observation of Appellee's aircraft in traveling approximately one mile from the place of the accident establishes that it continued in flight at about the same altitude until it struck the power line of Appellant which was strung at an altitude of 210 feet above the floor of the gorge. It is submitted that an airplane traveling in open and sparsely settled country is not bound under the regulation relied upon by Appellant to travel at an altitude of 500 feet. Furthermore, it is presumed that, if it were required by law to travel at that height, it did so. The old common law presumption to this effect is

statutory law in California. Section 1963 of the Code of Civil Procedure, in enumerating the disputable presumptions, includes as Number 33 "that the law has been obeyed."

None of the witnesses at the trial testified to seeing the collision of the plane with the wires, and Appellee is, therefore, aided by a presumption that at the point of impact with the wires the plane had gained altitude so that it was being operated in compliance with the regulation. When counsel for Appellant argued that the plane had barely withdrawn from sight of the witnesses at the time of the collision and, therefore, might well have been presumed to have continued traveling at the low altitude, the Trial Court was apparently moved more by the presumption of regularity than by the argument of counsel, for the District Judge said, at page 55 of the Record:

> "The Court: Suppose the plane had dropped on this power line. Suppose it was up 1,000 feet and had dropped. Nobody seems to have followed the airplane to where the accident occurred."

At page 56 the Court further commented:

> "The Court: There is no question but what the plane hit the power line. But how high was the plane above the power line? No one is being tried for a violation of an ordinance or the aeronautics rules.
>
> * * * * * * * *
>
> "The Court: Assuming that the plane was flying 200 or 235 or 335 feet from where these witnesses saw the plane, they all said that the plane came back and then disappeared and then, a few minutes later,

they heard about this crash; that somebody told them about it. They didn't even hear the crash. No one has told us how high the plane was flying at the time of this crash. It might have flown a few feet or might have flown a hundred feet above where the crash occurred. Can I assume from the evidence that the plane was flying low at this particular point; that it was flying low at the point where the impact was?"

Counsel for Appellant then suggested that the reasonable inference for the Court to draw was that the plane had continued at its low altitude. The Court replied:

> "It is up to you to prove your case not by inference but by facts." [R. 57.]

The evidence was thereupon reopened. Despite the taking of additional evidence, Appellant was unable to establish by the testimony of any witness that the plane was observed after it moved out of sight beyond the hill. The Trial Judge took the view that it had not been established that flying at the low altitude had been continued to the point of impact. The Court made the following remarks:

> "I have in mind the general rule of law that it is incumbent upon you to prove your case by a preponderance of the evidence. You are suing for negligence on the part of the operator of this plane. You must prove your case in this instance as in the general run of cases. You have only an inference based on the fact that he was traveling at the altitude to which the witnesses have testified. I am not sure that it is a violation of the rules, assuming the fact

to be true that he was traveling at that low altitude. We have come to the point now where I would have to do a lot of guessing if I would conclude it was negligence on his part to travel at that height. We get to the point now where the plane disappears from view, out of sight, of all the witnesses." [R. 77.]

"Undoubtedly, the plane came in contact with the power lines. How that happened nobody knows. If he was flying at a low altitude, in contravention of the Civil Aeronautics rule, before he disappeared from view—I can't say at that time, at the time of the accident, that he was flying at that low altitude. There is nothing in the evidence to that effect. I don't know that I can carry any such inference to the extent that you argue I should carry it." [R. 78.]

* * * * * * * *

"We are still speculating as to what happened at the time of the accident and I don't think that I can carry the inference that you suggest. In other words, I think it is your function to show negligence at the time when he disappeared from view. Nobody saw the accident. And, in view of my notion that I am not so sure that he was violating this rule in flying at that altitude, in that uninhabited area, I am going to sustain the motion of the defendant in this case." [R. 79.]

The language of the Judge of the District Court establishes that he found the facts against the Appellant and the finding is binding upon this Court.

Conclusion.

It is respectfully submitted that the decision and judgment of the District Court in dismissing the present action is supported by the law and that the judgment should be affirmed.

Respectfully submitted,

JAMES M. CARTER,
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ERNEST A. TOLIN,
Chief Assistant United States Attorney,

Attorneys for Appellee.